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The Impact of *People v Kisielewicz*

Revisiting Impact Statements
Under the Crime Victim's Rights Act

By David W. Thompson

On Good Friday in 1985, a drunk driver drifted over a highway center line and struck the Buick Park Avenue of a family traveling to northern Michigan from Chicago. The Buick swerved to avoid the oncoming truck and fishtailed down an embankment into a snow-covered field. The family's oldest son was killed in the accident. The impact of his passing, however, went far beyond that day.

The drunk driver entered a plea of *nolo contendere* to involuntary manslaughter and received the maximum sentence. He later appealed his sentence to the Court of Appeals, claiming, among other things, that letters written by the victim's parents, grandparents, aunt, and uncle should not have been included in the presentence investigation report and, therefore, could not be considered by the judge for sentencing purposes. In *People v Kisielewicz*, the Court rejected the driver's claims, finding that the parents had a right under the Crime Victim's Rights Act "to make a 'written or oral impact statement' to the probation officer and to have such written statement included

in the presentence investigation report" for consideration by the trial judge for sentencing.¹ Furthermore:

[A]s to the other letters, we note that existing case law and policy considerations provide that the presentence report should contain a broad range of information so that the sentence can be tailored to fit the circumstances of the individual defendant. Each of the attached letters concerned society's perceived need for protection from the offender. This is a valid consideration that is to be included in the presentence report.² (Citations omitted.)

The Court initially determined that the driver had an opportunity to challenge the presentence investigation report before sentencing but did not, and therefore the argument was not preserved. Thus, the language concerning the family's letters is arguably *dicta*. Yet *Kisielewicz* has been cited various times for its determination that non-victims' impact statements can be considered for sentencing.

In short: the *Kisielewicz* Court recognized that the crime's impacts extended beyond the victim and his parents, and thus went beyond the act in allowing loved ones to express the effect crime has had on their lives. This article proposes that the act be amended to follow the *Kisielewicz* decision.

Who is a victim under the Crime Victim's Rights Act?

Enacted on July 10, 1985, the Crime Victim's Rights Act grants victims various rights—including restitution and the right to make impact statements that can be used when the probation officer prepares a presentence investigation report.³ The act's purpose was to acknowledge public concerns about Michigan's criminal justice system and make it more responsive to victims.⁴ Thus, a judge would consider an impact statement included in a presentence investigation report before imposing a sentence on a convicted criminal. The impact statement may contain information helpful to a sentencing judge regarding harm the victim has suffered and a recommendation for an appropriate sentence.⁵

Not all individuals identified in the act who are affected by a crime will be victims for purposes of the act. The act initially defines victim as the individual “who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a crime,” except under certain conditions.⁶ Then the act establishes a priority for certain individuals other than the defendant if the victim is deceased,⁷ including the spouse of the deceased victim or the child of a deceased victim if the child is 18 years of age or older and there is no surviving spouse.⁸ Next, priority goes to the parent of a deceased victim if there is no surviving spouse or child.⁹ This priority order continues to include certain classes of relations, e.g., the guardian/custodian of a child of a deceased victim, a sibling of a deceased victim, and, finally, a grandparent of a deceased victim.¹⁰

Because the act's definition of a victim creates a specific order for determining who is a victim under the act when the direct victim is deceased, no two classes of relations—for example, a spouse and a child—can *both* be victims in these instances. Thus, in *Kisielewicz*, because the deceased (an 11-year-old boy) did not have a spouse or child, the parents were next in priority as victims and, therefore, were the only individuals who had a statutory right to provide an impact statement.

The Crime Victim's Rights Act's legislative history shows the controversial nature of impact statements. According to the 1985 House legislative analysis of the act, arguments against impact statements include that “giving a victim the right to address the sentencing judge could result in longer sentences,

which could in turn exacerbate the prison overcrowding problem,” and “since only certain victims will choose to make impact statements, some defendants could receive longer sentences than others who committed the same crime.”¹¹ The analysis indicates that some detractors found impact statements for parole purposes to be “particularly disturbing, and could lead to a resentencing of the prisoner.” The analysis concludes:

Clearly, the basic foundations of justice should not be sacrificed for the sake of making one party feel better. If uniform punishment is the ideal toward which we are striving, then allowing the possibility of individual vengeance is a great step backward.¹²

The concerns expressed in the analysis, therefore, suggest that the legislature deliberately limited victim status to safeguard defendants from undue prejudice and disparate sentencing. But for purposes of impact statements, the Michigan Court of Appeals has routinely extended victim status to other classes of relations without regard to the statutory order of conditional priority.

FAST FACTS

The purpose of the Crime Victim's Right Act was to acknowledge public concerns about Michigan's criminal justice system and make it more responsive to victims.

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Since *People v Kisielewicz*, the Court of Appeals has regularly recognized and upheld the rights of victims' family members—regardless of the Crime Victim's Rights Act's order of priority—to include impact statements in the presentence investigation report for sentencing, including in violent crime cases.



Caselaw since *Kislewicz*

Since *Kislewicz*, the Court of Appeals has regularly recognized and upheld the rights of victims' family members—regardless of the Crime Victim's Rights Act's order of priority—to include impact statements in the presentence investigation report for sentencing, including in violent crime cases. For example, in *People v Nowos*, the defendant was convicted of voluntary manslaughter and possession of a firearm during commission of a felony. The defendant challenged his sentence, arguing that the trial court erroneously considered impact statements by the victim's parents in the presentence investigation report.¹³ Although the Court found that the victim's parents were not victims as defined by the act because there was a surviving spouse, it held that the trial court was not precluded from considering the statements at sentencing. Citing *Kislewicz*, the Court reasoned that "a presentence report properly may contain a broad range of information so that the sentence can be tailored to the circumstances of the individual offender."¹⁴

Similarly, in *People v Prior*, the defendant was convicted of assault with intent to do great bodily harm less than murder and being in possession of a weapon. The defendant challenged the sentence on the grounds that the trial court erroneously considered sentencing letters written by persons other than the direct victims.¹⁵ The Court of Appeals disagreed, citing *Kislewicz* and finding that "[s]uch information is properly considered by a court at sentencing in addition to the rights granted victims to address the court on sentencing."¹⁶

Finally, in *People v Caldwell*, the impact statement of the defendant's estranged girlfriend was determined to have been properly considered at sentencing for his kidnapping and felony firearm convictions.¹⁷

Kislewicz has also been cited for sentencing in sexual misconduct cases. In *People v Hanson*, the defendant was convicted

of second-degree criminal sexual conduct and objected to the presentence investigation report, which included impact statements by the complainant's sisters.¹⁸ Citing *Kislewicz*, the Court rejected this challenge and found that "statements by people other than the complainant can be included in the presentence investigation report to provide the sentencing report with necessary information" so that the sentence can be tailored to fit the circumstances of the individual defendant.¹⁹

Similarly, in *People v Rouse*, the Court of Appeals determined that letters from victims of other acts that were dismissed as charges were properly admitted for sentencing for the defendant's criminal sexual conduct III conviction.²⁰

In some respects, the significance of *Kislewicz* is uncertain; nothing can cushion the impact of a senseless tragedy for any family. However, the *Kislewicz* opinion, which was decided in 1986 and is not binding on subsequent Court of Appeals' panels,²¹ still stands for the proposition that the family of a victim has the right to provide information to be considered at sentencing about the impact of the crime regardless of the Crime Victim's Rights Act's order of conditional priority for victims. This right arguably has its greatest effect when direct victims cannot speak for themselves, i.e., when a victim is deceased or incapacitated.

Revisiting impact statements under the Crime Victim's Rights Act

The Crime Victim's Rights Act should be amended to codify *Kislewicz*. With respect to the concerns of the act's original opponents, much of our criminal procedure is established in the federal constitution (and applies to the states by incorporation) to protect defendants from the heaviest levies of state power, i.e., the ability to deny an individual his or her life and liberty.²² But victim impact statements do not disturb the delicate balance between the need for justice and the protection of defendants. This suggestion ignores the limited powers of government and their concomitant separation.²³ Specifically, the state's power is limited to enumerated executive powers, which are circumscribed by procedural protections to safeguard individual rights, and substantive law and penalties are determined by the legislature. Finally, the judicial branch interprets and applies substantive law and metes out appropriate penalties.

To the contrary, victim impact statements are not tools of state power, but are offered by non-state actors—the defendant's fellow citizens. Accordingly, impact statements cannot result in sentences longer than the maximum sentence, which is set by statute. If this is a policy that the public and the legislature want to address, they can change the sentencing schemes in our criminal code. The same is true for overcrowding in prisons.

At the crossroads of law and life, it is impossible to believe that the effects of criminal behavior are as limited, prioritized, and conditional as the Crime Victim's Rights Act's "victim" definition suggests.

Neither are impact statements expressions of individual vengeance—any measure of vengeance is levied by the state in accordance with our criminal laws. More fundamentally, the criminal justice system seeks to realize certain public goals such as deterrence and rehabilitation.²⁴ As recognized by the *Kisielewicz* Court, impact statements serve to protect society and teach offenders the consequences of their actions, helping to rehabilitate or deter criminal behavior.²⁵

In addition, it is axiomatic that negligent behavior takes its victims as it finds them.²⁶ This is well-established in principles of tort law—the eggshell skull doctrine—which are adopted in Michigan's civil jury instructions.²⁷ This doctrine, while sounding in tort, is nevertheless instructive when thinking about the policy behind impact statements. For example, if the 11-year-old victim in *Kisielewicz* had no family to speak on his behalf, we would describe the defendant's behavior as no less criminal. Further, the fact that there may be disparate treatment or sentences for two identical crimes is merely a function of chance. While the defendants engaged in the same behavior, the fact that there may or may not be other family members to speak on behalf of the deceased is also a matter of chance, which one assumes when engaging in criminal behavior. Like the negligent actor, the criminal takes the victim and his or her loved ones as he finds them.

Finally, at the crossroads of law and life, it is impossible to believe that the effects of criminal behavior are as limited, prioritized, and conditional as the Crime Victim's Rights Act's "victim" definition (in instances where the victim is deceased) suggests. In reality, each time a crime is committed, it most likely affects many people—and family members in particular. For example, would it have made sense to deny the *Nowos* parents the opportunity to provide an impact statement merely because the victim had a surviving spouse? Or the *Kisielewicz* grandparents merely because there were surviving parents? I suggest it would not. Amending the act to comport with *Kisielewicz*—to identify all family members of deceased victims set forth in MCL 780.752(m)(ii) as victims for purposes of impact statements without regard to any

order or conditions—would acknowledge the stark reality of a crime's effect on families and bring our criminal code closer to the lives of those it governs. ■



David W. Thompson practices state and local tax law in Lansing. He dedicates this article to the memory of Matthew W. Thompson.

ENDNOTES

1. MCL 780.751 *et seq.* and *People v Kisielewicz*, 156 Mich App 724, 728, 402 NW2d 497 (1986).
2. *Id.*, p 729. The United States Supreme Court has recognized that "protection from society" is a basic consideration in sentencing; see *Williams v New York*, 337 US 241, 69 S Ct 1079; 93 L Ed 1337 (1949) and *People v Snow*, 386 Mich 586, 592, 194 NW2d 314 (1972).
3. MCL 780.764.
4. House Legislative Analysis, HB 4009, HB 4545, HB 4370 (May 15, 1985); van Regenmortel, *Crime Victims' Rights—A Legislative Perspective*, 17 Pepp L Rev 1 (1990) <<https://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1692&context=plr>> [accessed January 30, 2018].
5. *Id.*, p 66; MCL 780.764 and 780.765.
6. MCL 780.752(m)(i).
7. MCL 780.752(m)(ii).
8. MCL 780.752(m)(iii)(A) and MCL 780.752(m)(iii)(B).
9. MCL 780.752(m)(iii)(C).
10. MCL 780.752(m)(iii)(D)–(F).
11. House Legislative Analysis, pp 2–3.
12. *Id.*
13. *People v Nowos*, unpublished opinion per curiam of the Court of Appeals, issued February 20, 2001 (Docket No. 212825).
14. *Id.*, p 3; see also *People v Albert*, 207 Mich App 73, 74; 523 NW2d 825 (1994).
15. *People v Prior*, unpublished opinion per curiam of the Court of Appeals, issued January 16, 1998 (Docket No. 181645).
16. *Id.*, pp 6–7.
17. *People v Caldwell*, unpublished opinion per curiam of the Court of Appeals, issued April 22, 1987 (Docket No. 185251), p 5.
18. *People v Hanson*, unpublished opinion per curiam of the Court of Appeals, issued November 27, 2001 (Docket No. 224328).
19. *Id.*, pp 2–3.
20. *People v Rouse*, unpublished opinion per curiam of the Court of Appeals, issued November 3, 2000 (Docket No. 216303), pp 6–7.
21. MCR 7.215(J)(1).
22. US Const, Am XIV, § 1.
23. Const 1963, art III, § 2.
24. See generally *Williams v New York*, 337 US 241; 69 S Ct 1079; 93 L Ed 1337 (1949); *People v Snow*, 386 Mich 586; 194 NW2d 314 (1972).
25. *Kisielewicz*, p 727.
26. *Pierce v Gen Motors Corp*, 443 Mich 137, 155–156; 504 NW2d 648 (1993).
27. M Civ JI 50.10 ("a basic tort rule of law—a tortfeasor takes his victim as he finds him"). See also *Richman v Berkley*, 84 Mich App 258, 261; 269 NW2d 555 (1978).

607 Highland Avenue
Fort Thomas, Kentucky 41075
December 17, 1985

Mr. Wm. Catinella
Department of Corrections
328 Washington Street
Traverse City, Michigan 49684

Subject: Sentencing of Donald Joseph Kisielawicz

Dear Sir:

We are the grandparents of Matthew Thompson who was killed on Good Friday of this year by a vehicle driven by Mr. Kisielawicz, who was drunk at the time. When an eleven year old boy is removed from his family, it leaves a void which cannot be filled and which is especially painful at this time of year.

Mr. Kisielawicz's history of DUI arrests indicates he is not a responsible person and is a menace to his peers. We therefore think that he should be given the maximum sentence under Michigan law.

Thank-you for your consideration.

Mr. & Mrs. Wm. N. Thompson